Supreme Court, U. S.
FILED
DEC 12 1980
MICHAEL RODAK, JR., CLERK

80-960

No.

In the

Supreme Court of the United States

OCTOBER TERM, 1980

STEVEN F. MATSCHKE,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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The Scheffer Press, Inc.—(312) 263-6850

QUESTION PRESENTED FOR REVIEW

Whether, in a probation revocation hearing, the trial court's actions in denying Petitioner the opportunity to make a motion to suppress physical evidence prior to the hearing, and the opportunity during the hearing to cross examine the arresting officer in order to determine whether he knew petitioner to be a probationer at the time of the unlawful search violated Petitioner's right to Due Process.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Steven Matschke, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois entered on September 29, 1980.

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OPINIONS BELOW

The Supreme Court of Illinois, on September 29, 1980 denied Petitioner's petition for leave to appeal. See Appendix A. hereto, infra page 7a. The opinion of the Appellate Court of Illinois, Fourth District is reported at 83 Ill.App.3d 1000, 404 N.E.2d 1047 (4th Dist. 1980), and is contained in Appendix A hereto, infra, page 1a.

JURISDICTION

The jurisdiction of this Honorable Court is invoked pursuant to Title 28, United States Code, Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT 4

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, libery or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 14

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On January 19, 1976, Petitioner Steven F. Matschke entered a guilty plea to the charge of unlawful delivery of a substance represented as a controlled substance, in violation of Illinois Revised Statutes, 1973, Chapter 56½, Section 1404. He was sentenced to a four year term of probation and ordered to pay a fine of $1,000.00 and costs. (C.43-44).

On January 18, 1979 the State filed a Petition to Revoke Probation charging, *inter alia,* that Petitioner had committed the offenses of unlawful possession of less than 30 grams of cocaine and possession of between 2.5 and 10 grams of cannabis. (C.52-53). Petitioner was separately charged with these substantive offenses in Case Number 78 CF 1382. (C.59)

Prior to the probation revocation hearing, Petitioner requested the trial court to allow him to adopt a motion to suppress physical evidence which he had previously filed in the substantive case. In that case, the motion had been denied without a hearing due to defense counsel's inability to appear on the date set for the hearing on the motion. The trial court at the revocation hearing denied Petitioner leave to adopt the motion or to file a new motion to suppress based in part on the ruling in *People* v. *Dowery,* 62 Ill.2d 200, 340 N.E.2d 529 (1975). (R.P. 5/11/79 at 15).

The only occurrence witness called by the State on the petition for revocation was Champaign County Deputy Sheriff, Gregory Doty. He testified that, while he was on routine patrol, on November 23, 1979, he stopped Petitioner's automobile after observing that it was speeding

65 mph in a 55 mph zone, and that he had failed to properly signal for a turn. (R.P. 5/11/79, 16-17, 39-40). Doty requested Petitioner to produce his driver's license. Doty checked the license at the scene and learned that it had been suspended. (R.P. 5/11/79, at 18-19). Doty then placed Petitioner under arrest for driving while his license was suspended and handcuffed him. Doty then removed a shaving kit and zippered flight bag from the passenger area of Petitioner's vehicle and transported Petitioner and the two items to the Sheriff's office. There, while a jailer began processing Petitioner, Officer Doty, over Petitioner's repeated objections, opened the flight bag and shaving kit and found among the contents quantities of cannabis and cocaine. (R.P. 5/11/79 at 20-22).

During the cross-examination of Officer Doty by defense counsel, the following exchange took place:

> MR. GLASS (Defendant's Attorney): Do you always check the driver's license on every person you stop?
> OFFICER DOTY: Not always, no.
> MR. GLASS: Why did you do so in this case?
> OFFICER DOTY: I recognized the man—
> MR. LIPTON (Assistant State's Attorney): Again, your Honor, I am going to object. What is the relevance at this point of that question?
> THE COURT: Mr. Glass?
> MR. GLASS: Just quickly, your Honor, for the purposes of protecting the record.
> THE COURT: On what?
> MR. GLASS: Just basically on the search and seizure.
> THE COURT: Well, that's preserved.
> MR. GLASS: And also testing the offcer's memory.
> THE COURT: Well, you may answer that question.

OFFICER DOTY: *I recognized Mr. Matschke from an incident that occurred some time back* and thought a driver's license check would be in order.
MR. GLASS: When did that incident occur?
MR. LIPTON: Objection, your Honor.
THE COURT: I'll sustain the objection.

(R.P. 5/11/79 at 39-40, emphasis added). No further testimony was permitted regarding the circumstances which caused Officer Doty to recognize Petitioner from an earlier incident. The trial court sustained the petition for revocation of probation, (R.P. 5/11/79 at 138) and sentenced Petitioner to serve one to three years in the Illinois Department of Corrections for the violation (R.P. 7/27/79 at 11).

REASONS FOR GRANTING WRIT

In recent years, a body of case law has evolved regarding the applicability of the exclusionary rule, *Mapp* v. *Ohio,* 367 U.S. 643, 81 SCt. 1684 (1961), to probation revocation proceedings. The decisions, handed down by various federal and state jurisdictions, hold substantially that a motion to suppress evidence does not lie in a hearing to revoke probation absent a showing of police harassment or gross misconduct directed at a suspect whom the police officers know or have reason to believe is a probationer.[1] *United States* v. *Vandemark,* 522 F.2d 1019 (9th Cir. 1975); *United States* v. *Brown,* 488 F.2d 94 (5th Cir. 1973); *United States* v. *Rushlow,* 385 F.Supp. 795 (SD Cal. 1974); *United States ex. rel. Lombardino* v. *Heyd,* 318 F. Supp. 648 (E.D. La. 1970); *State* v. *Davis,* 375 So.2d 69 (La. 1979); *People* v. *Knight,* 75 Ill.2d 291, 388 N.E.2d 414 (1979); *State* v. *Nettles,* 287 Or. 131, 597 P.2d 1243 (1979); *State* v. *Shirley,* 117 Ariz. 105, 570 P.2d 1278 (1977); *State* v. *Proctor,* 16 Wash. 865, 559

[1] *United States* v. *Workman,* 585 F.2d 1205 (4th Cir. 1978), however, holds that unconstitutionally seized evidence is inadmissable in a probation revocation hearing. "(T)he Supreme Court has never exempted from the operation of the exclusionary rule any adjudicative proceeding in which the government offers unconstitutionally seized evidence in direct support of a charge that may subject the victim of a search to imprisonment. Indeed the Court has observed that standing to invoke the exclusionary rule is premised on a recognition that the need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search." 585 F.2d at 1211 (citation omitted).

P.2d 1363 (1977); *State* v. *Sears,* 553 P.2d 907 (Alaska, 1976); *People* v. *Dowery,* 62 Ill.2d 200, 340 N.E.2d 529 (1975).

The rationale underlying these principles was perhaps best explained in *United States* v. *Winset, supra.* There the Court balanced the goal of deterring police misconduct against the goals sought to be achieved by sentencing an individual to a period of probation. Recognizing that a sentence of probation reflects a concern with rehabilitation as well as affording society a measure of protection, the court reasoned that all reliable evidence of a probationer's conduct must be made available in determining whether he has violated the conditions of probation. For this reason, there can be no blanket applicability of the exclusionary rule to revocation proceedings.

Notwithstanding the relevance of *all* evidence of a probationer's conduct, the court also recognized that:

> "when the police at the moment of search know that a suspect is a probationer, they may have a significant incentive to carry out an illegal search even though knowing that evidence would be inadmissable in any criminal proceeding. The police have nothing to risk: If the motion to suppress in the criminal proceedings were denied, defendant would stand convicted of a new crime; and if the motion were granted, the defendant would still find himself behind bars due to revocation of probation. Thus, in such circumstances, extension of the exclusionary rule to the probation revocation proceeding may be necessary to effectuate Fourth Amendment safeguards."
> *United States* v. *Winsett, supra,* 518 F2d at 54, n.5

The foregoing cases indicate that two elements must be satisfied in order to succeed in suppressing the evidence at a revocation hearing: The evidence must have

been seized in violation of the Fourth Amendment; and the probationer must demonstrate that the search was a product of police harassment.

In the case at bar, the search of the shaving kit and flight bag which resulted in the seizure of the cocaine and cannabis was conducted without a warrant, without probable cause and without Petitioner's consent. The search was not incidental to an arrest in that it occurred after Petitioner had been transported to the police station and thus, there was no danger of Petitioner obtaining a weapon from within these items nor of him destroying any evidence therein. The search and seizure therefore ran afoul of the Fourth Amendment. *United States* v. *Chadwick,* 433 USI, 97 SCt, 2476 (1977); *People* v. *Bayles,* 82 Ill. 2d 128 N.E. 2d (1980); *People* v. *Hamilton,* 74 Ill. 2d 457, 386 N.E.2d 53 (1970); *People* v. *Reed,* 37 Ill.2d 91, 227 N.E.2d 69 (1967); *People* v. *Erickson,* 31 Ill.2d 230, 201 N.E.2d 422 (1964).

Moreover, the offense for which Petitioner was arrested, driving while license is suspended, is a misdemeanor, for which there is a statutory bond. Ill. Rev. Stat., Chapter 110A, Section 526. Therefore, he should have been informed of the prescribed bond, allowed to post it and permitted to leave the station without being submitted to the thorough search required for more serious offenders. *United States* v. *Mills,* 472 F2d 1231 (D.C. Cir. 1972); *People* v. *Seymour,* 80 Ill. App. 3d 221, 398 N.E.2d 1191 (1st Dist. 1979).

Given that the exclusionary rule can apply to probation revocation proceedings in certain circumstances, the problem that must be faced is how to establish the applicability of the rule. In the instant case, the Petitioner attempted

to adopt a motion to suppress evidence which had been filed but not heard in the substantive case. This was denied by the trial court, and the revocation hearing commenced. During the hearing, certain evidence was elicited, indicating that the arresting officer, who conducted the search, had known Petitioner from an earlier incident. Further cross-examination as to the nature and circumstances of that earlier incident was prohibited by the trial court.

It is significant that, under Illinois law, a probationer does *not* have any right to discovery in a probation revocation hearing. *People* v. *DeWitt,* 78 Ill.2d 82, 397 N.E.2d 1385 (1979). This denial of discovery substantially impedes the making of a motion to suppress evidence which, in a revocation hearing, *must* contain an allegation of police harassment. It is also significant that in a criminal case, under Illinois law, a motion to suppress evidence can be raised during a trial if the defendant was unaware of the grounds therefore prior to the trial. Ill. Rev. Stat, Chap. 38, Section 114-12.

In light of these provisions, the trial court's restriction of the cross-examination of the police officer deprived Petitioner of due process. Petitioner lacked the opportunity prior to the hearing to discover evidence which might have been relevant to the making of an appropriate motion to suppress, and he was restricted during the hearing from investigating further into the area of police harassment. As a consequence, the applicability of the exclusionary rule to the probation revocation proceedings below was nothing more than an empty technicality.

CONCLUSION

Wherefore, Petitioner prays that a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 15760

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

STEVEN F. MATSCHKE,

Defendant-Appellant.

Appeal from Circuit Court Champaign County

75-X-1264

Honorable HAROLD L. JENSEN, Judge Presiding.

Mr. JUSTICE TRAPP delivered the opinion of the court:

Defendant appeals from the order of the trial court which revoked probation and imposed a sentence of 1 to 3 years. In 1976, defendant was sentenced to 4 years' probation and a fine of $1,000 upon his plea of guilty to a violation of section 404 of the Illinois Controlled Substances Act (Ill. Rev. Stat. 1977, ch. 56½, par. 1404). The petition to revoke probation filed in January 1979 alleged *inter alia* the possession of a controlled substance, cocaine, in violation of section 402(b) of the Act (Ill. Rev. Stat. 1977, ch. 56½, par. 1402(b)).

It is argued that the trial court erred in refusing to allow defendant to make a motion to suppress evidence and in admitting into evidence items alleged to be unlawfully seized; that the trial court erred in denying defendant's motion for a competency hearing, and that a subsequent hearing ruled that defendant was fit to be sentenced and whether there was an abuse of discretion in the sentence imposed.

Defendant was stopped when a deputy sheriff observed the defendant speeding and failing to signal a turn. Defendant produced his operator's license as requested and the deputy's radio inquiry disclosed that the license had been suspended. He was then arrested, handcuffed and transported to the county jail. Defendant sought to remove, and then requested that the deputy remove two small bags from his car to be taken with the defendant. One of the bags was said to contain money for defendant's bond. Incident to defendant's booking at the jail, the bags were searched over defendant's objection and the contraband at issue was discovered.

Section 114-12(b)(c), of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1977, ch. 38, par. 114-12 (b)(c)) governing motions to suppress, provides:

> "(b) The motion shall be in writing and state facts showing wherein the search and seizure were unlawful. * * *.
>
> (c) The motion shall be made before trial unless opportunity therefore did not exist or the defendant was not aware of the grounds for the motion. If the motion is made during trial, and the court determines that the motion is not timely * * *."

No written motion was filed in this case. On March 30, 1979, the hearing on probation revocation was set to be heard on May 11. After the hearing was commenced on the latter date a motion was made orally that a motion to suppress that had been filed in a companion charge be heard in this case. That motion had been set for hearing and denied upon counsel's failure to appear at the date set. The trial court denied the oral motion to suppress as untimely.

In argument here, defendant concedes that in *People* v. *Dowery* (1975), 62 Ill. 2d 200, 340 N.E. 529, the supreme court determined that exclusion of evidence alleged to have been illegally seized in violation of the fourth amendment to the United States Constitution was not applicable in proceedings for revocation of probation. In short, it was held that evidence which had been sup-

pressed upon a charge of burglary was nevertheless admissible in proceedings for revocation of probation.

It is contended that this case comes within an exception to the holding in *Dowery*. In defendant's statement "If the police involved either had knowledge, or had reason to believe that defendant was on probation at the time the search was conducted, then the Fourth Amendment safeguards against unreasonable searches and seizures must be applied in the proceedings to revoke probation." That statement, in argument, refers to certain language quoted in *Dowery* and in *People* v. *Watson* (1979), 69 Ill. App. 3d 497, 387 N.E.2d 849, 26 Ill. Dec. 19. The stated argument claims to be founded in defendant's cross-examination of the arresting officer at the revocation proceedings concerning the officer's request to examine defendant's driving license. The officer had stated that he did not always check a driver's license, although he usually did so. In response to questions, the officer stated that he recognized defendant "from an incident that occurred some time back and thought a driver's license check would be in order." The prosecution's objections through further cross-examination concerning the "incident" were sustained.

As stated in *Dowery* and *Watson*, the true basis for the possible exception considered in *Dowery* is where the motion to suppress alleges, and the evidence discloses, police harassment of one who is on probation. In *Watson*, it was essentially conceded by the prosecution that the arrest was made without probable cause. The denial of a motion to suppress was affirmed under the statement of *Dowery* when the reviewing court determined that police harassment was neither alleged nor shown under the evidence. In *People* v. *Knight* (1979), 75 Ill. 2d 291, 388 N.E.2d 414, 26 Ill. Dec. 699, evidence at revocation proceedings disclosed that an arresting officer was acquainted with defendant during a period of probation. It being contended that evidence seized should be suppressed as an exception to the rule of *Dowery*, the court said:

> "[B]ut there was no evidence that he knew defendant was a probationer. Nor did defendant's motion make any reference to the officer's prior knowledge of him or his status. Without that essential allegation and proof, the sole basis for considering whether police harassment of probationers justifies extension of the exclusionary rule to probation revocation proceedings never arises." 75 Ill. 2d 291, 299, 388 N.E.2d 414, 418.

The evidence here does not suggest that there was "police harassment" in the stopping of defendant on the highway and his subsequent arrest. The incident occurred in the night time at the junction of an interstate highway and a state highway. There was pursuit for the speeding and it was not argued that the officer knew whom he was stopping. We will not say that the subsequent acts of the officer in requesting examination of the defendant's driving license; in making the inquiry which disclosed that the license had been suspended, or in making the arrest for driving with a suspended license constitutes "police harassment." Moreover, the incident of the alleged illegal search did not occur until after the lawful arrest and the bags were taken from defendant's car at his own request and the search was made at the booking station.

We affirm the trial court's determination that there was no timely motion to suppress, and again, that there were no facts supporting a claim of police harassment.

On the day preceding the revocation hearing. defendant filed a motion for a competency hearing. Counsel have made no representation in the record that defendant was unable to understand the nature of the proceedings, or was unable to cooperate with counsel. The motion was first raised after the revocation hearing was called up. The motion was accompanied by two brief conclusory affidavits, each reciting an examination at an unspecified time and an opinion that defendant was unable to understand the state of the charges and was unable to assist

counsel. One affiant was a psychologist, Pitluk, and one a psychiatrist, Reinstein. The trial court noted that in argument defendant's counsel were not relying upon the affidavits of the psychologist. (See *In re Wellington* (1975), 34 Ill. App. 3d 515, 340 N.E.2d 31; *People* v. *Gilliam* (1974), 16 Ill. App. 3d 659, 306 N.E.2d 352.) The trial court noted that the brief affidavit did not state any facts which supported the opinion expressed. Colloquy of court and counsel referred to a letter from the psychiatrist as being at some variance with the affidavit, but that letter is not in the record. The trial court found no facts presented by affidavit which raised a *bona fide* doubt and required a hearing upon defendant's fitness to stand trial. (Unified Code of Corrections, sec. 5-2-1(c) (Ill. Rev. Stat. 1977, ch. 38, par. 1005-2-1(c).) We find no abuse of discretion by the trial judge. (*People* v. *Carter* (1974), 16 Ill. App. 3d 842, 306 N.E.2d 894.) Neither conduct of defendant, as observed by the trial judge, nor representation of counsel presented any facts which raised a *bona fide* doubt of fitness and the cause was set for sentence hearing on June 8, 1979.

Upon convening court for the sentencing hearing, the defendant again presented a motion for a competency hearing as to sentence and presented a psychiatrist, Ziporyn, representing that he would testify that defendant was a schizophrenic suffering from a mental disease causing defects in reason and judgment. The trial court heard the testimony of the psychiatrist retained by defendant. Based upon defendant's answers to certain questions said to be commonly used by psychiatrists, the witness concluded that defendant was a schizophrenic and that test results reported by a psychologist showed a distortion of thought processes. His conclusion was that defendant employed private meanings or symbols in communication so that his counsel could not always correctly determine the meaning of the words used by defendant.

The two psychiatrists appointed by the court testified that each found no clinical evidence of schizophrenia and no evidence of psychiatric illness. The first found that

defendant had an unusually good relationship with his attorneys and that he could explain his legal problems. He found no hallucinations, delusions, or bizarre behavior which is characteristic of schizophrenia. As to some questions the psychiatrist found defendant evasive but not stubbornly so, and that defendant would respond to rephrased questions. He characterized the evasive answers as comparable to those of a politician at a press conference. The second appointed psychiatrist found no evidence of mental illness, although defendant believed that "recreational use" of drugs ought not to be considered criminal. He found no answers to questions by defendant which were peculiar or remote from the subject. Thereafter, the trial court found that defendant was competent to be sentenced.

Upon the issue of defendant's competence to stand trial or to be sentenced under section 5-2-1 of the Unified Code of Corrections (Ill. Rev. Stat. 1977, ch. 38, par. 1005-2-1), the prosecution must establish defendant's competence by a preponderance of the evidence. (*People* v. *McCullum* (1977), 66 Ill. 2d 306, 362 N.E.2d 307, 5 Ill. Dec. 836; *People* v. *Wells* (1975), 30 Ill. App. 3d 968, 333 N.E.2d 496.) While only summarized, we have examined the testimony of the psychiatrists and find that the trial court's finding is not against the manifest weight of the evidence.

Defendant argues that the trial court abused its discretion in imposing sentence and failed to consider the factors in mitigation as stated in section 5-5-3.1 of the Unified Code of Corrections (Ill. Rev. Stat., 1978 Supp., ch. 38, par. 1005-5-3.1.) It is argued that probation is the preferred sentence under the Code and that there was no threat of serious harm to any person arising from the offense.

The record shows, however, that defendant substantially ignored all of the requirements of the prior probation order. That record does not support a conclusion that defendant's conduct was the result of circumstances unlikely to recur, that defendant was particularly likely to comply with the terms of a probation order, or that

the character or attitude of defendant indicates that he is unlikely to commit another offense.

Here, the trial court concluded that defendant's actions followed his belief that the use of controlled substances should not be considered as offense and that further probation would deprecate the seriousness of the offense and would be inconsistent with the ends of justice.

Under the provisions of section 5-5-4.1 of the Unified Code of Corrections (Ill. Rev. Stat., 1978 Supp., ch. 38, par. 1005-5-4.1) upon the record the presumption that the sentence imposed was proper has not been rebuffed. Neither can we find an abuse of discretion on the part of the trial judge.

The judgment is affirmed.

Affirmed.

MILLS, *P.J.*, and GREEN, *J.*, concur.

ILLINOIS SUPREME COURT

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September 29, 1980

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No. 53607 - People State of Illinois, respondent, vs. Steven F. Matschke, petitioner. Leave to appeal, Appellate Court, Fourth District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ Clell L. Woods
Clerk of the Supreme Court